

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

In the Matter of Charles R. Malmberg, Jr.,
Petitioner, and the City of Minneapolis,
Employer.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for Prehearing Conference on September 29, 1995 at the Office of Administrative Hearings in Minneapolis. The time set aside on September 29, 1995 was scheduled originally for an Evidentiary Hearing in the matter, but by prior agreement of counsel and the Administrative Law Judge, a Prehearing Conference was held. At the Prehearing Conference, the parties, counsel and the Administrative Law Judge discussed the facts of the case and oral argument was taken on the legal issues in dispute. The Administrative Law Judge agreed to draft a Stipulation of Facts, styled as Proposed Findings of Fact, for consideration by the parties and counsel, in lieu of presiding over an Evidentiary Hearing.

After Initial Briefs and Reply Briefs were filed on the legal issues, the Administrative Law Judge (ALJ) issued Proposed Findings of Fact, which were modified and adopted by the parties and/or their representatives as their Stipulation of Facts on January 18, 1996. The ALJ reviewed the Stipulation of Facts and informed the parties he would adopt it as his Findings of Fact for this proceeding. The record in this matter closed on January 26, 1996.

Gayle Gaumer, Attorney at Law, Wilson Law Firm, Suite 220, 4933 France Avenue South, Edina, MN 55410, appeared on behalf of Charles R. Malmberg, Jr. ("Petitioner", "Veteran"). Larry L. Warren, Assistant Minneapolis City Attorney, 300 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402-2453, appeared on behalf of the Department of Public Works of the City of Minneapolis ("City", "Employer").

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gerald Bender, Veterans Preference Officer,

Department of Veterans Affairs, Second Floor Veterans Service Building, 20 West 12th Street, St. Paul, MN 55155 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

Whether the City violated Minn. Stat. § 197.46 by failing to provide Charles Malmberg with adequate ". . . stated charges, in writing" prior to his removal from one position to another; and, if it did, what relief is appropriate?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Charles R. Malmberg, Jr., served on active duty in the United States Army from March 2, 1970 to October 5, 1971. He received an Honorable Discharge with the rank of Specialist 4 (E4), having served in Vietnam as a driver and cannoneer in a field artillery unit.

2. Mr. Malmberg is a (Class A) Journeyman Electrician and a member of Local 292 of the International Brotherhood of Electrical Workers. He began his apprenticeship as an electrician through Local 292 in 1978, qualifying as a journeyman in 1981 or 1982. Malmberg worked as a journeyman electrician for a number of private electrical contractors, on assignment out of the Local's hiring hall, until 1989, when he began employment as a field electrician for the City of Minneapolis's Department of Public Works.

3. A written On-Site-Job-Analysis executed by Clint Courtney, his QRC and countersigned by Mr. Malmberg's foreman, Tom Piersak, states that the work routine for field electricians in the Department of Public Works involves constant lifting and/or carrying of objects weighing up to 10 pounds, occasional (less than 1/3 of the time) lifting and/or carrying of more than 10 pounds, and rarely (less than 5% of duties) lifting over 30 pounds. Electricians are instructed not to lift any object weighing more than 70 pounds without help. There are certain job assignments that are more demanding.

4. On January 3, 1991, Mr. Malmberg fell off a bucket truck and injured his lower back. He was out of work as a result of the injury, had surgery later in January of 1991 and returned to work on March 19, 1991. Since the time of that injury, the Petitioner has been restricted against performing work with 90 pound jackhammers. He returned to his full duties as a field electrician, with a restriction against jackhammer work and a permanent lifting restriction of 75 pounds. During the time noted in this Finding, the Petitioner received salary and benefits at the pay rate of an electrician.

5. On August 18, 1993, the Petitioner was examined by his physician, who repeated the restriction against jackhammer use and lifting over 75 pounds and restricted him from frequent or heavy use of a shovel.

6. On November 24, 1994 Mr. Malmberg sustained an injury to his right-side lower back and right buttock while climbing from the ground into the cab of a truck. Subsequent to this injury, the Petitioner was out of work from January 4, 1995 to

February 13, 1995. During that period he was awarded workers' compensation in the amount of \$485.00 per week.

7. Mr. Malmberg returned to work on February 13, 1995 with a temporary (one week) 20 pound lifting restriction in addition to the restriction against use of a jackhammer in effect since 1991. The lifting restriction was increased to a 40 pound lifting restriction on February 21. On March 13, 1995, the lifting restriction was raised to 60 pounds.

8. On his return to work on February 13, 1995 Malmberg was assigned to work on the "Locator Crew" in the Department of Public Works. On February 16, 1995, the City issued a letter, with attachment, to Mr. Malmberg, informing him that he was being temporarily re-assigned to a position of Engineering Aide I, pending a permanent solution, effective February 13, 1995, at a bi-weekly pay rate of \$1225. Malmberg's bi-weekly pay as an electrician had been \$1804 before he went on workers' compensation.

The Petitioner did not receive the February 16 letter and attachment until sometime during the week of February 20, 1995. He has not received any electrician pay or benefits since his re-assignment to the position of Engineering Aide I on February 13, 1995, except under a 30 day full pay agreement between the Labor Relations Department and Mr. Malmberg's union.

9. The February 16 letter, with attachment, sent to Malmberg (Joint Prehearing Ex. 2, appended to this Report and incorporated herein by reference) states, in part:

"... The difference between your rate of pay as an electrician at the time of your injury, and the Engineering Aide I rate of pay will be picked up by our Worker Compensation Division (provided you have been approved by Worker's Compensation). They will be picking up 2/3 of the difference between the two rates of pay.

While you are in the position of Engineering Aide I, the time you put towards this classification does not apply towards your hours as an electrician. This is a temporary assignment until a permanent solution can be found to your situation.

This position does meet the limitations placed on you by your doctor and/or QRC."

Attached to the letter was a City of Minneapolis "Detail Request and Authorization" form, also incorporated herein by reference as part of Exhibit 2. The form specifies that the assignment of Malmberg to work as an Engineering Aide I starts on February 13, 1995 and lasts through "8/11/95 (or as needed)". The form appries Mr. Malmberg that, if he is a veteran, he may appeal the action taken by filing an appeal with the Minneapolis Civil Service Commission within 60 days "from the date of notification".

10. The electrician's position filled by Mr. Malmberg prior to February 13, 1995 has not been abolished.

11. On April 13, 1995, Mr. Malmberg filed a Petition with the Department of Veterans Affairs on the ground that he was removed from his position without receipt of "stated charges, in writing" as required by the Veterans Preference Act. The Petition requests reinstatement, with back pay and benefits, to February 13, 1995, and continued employment for Malmberg as an electrician until such time as the City has complied with all notice and hearing requirements of the Veterans Preference Act "and cause for removal under the act is proved."

12. Since February 13, 1995, Mr. Malmberg has been paid \$275.39 bi-weekly in Workers' Compensation, in addition to his wages as an Engineering Aide I. That dollar figure represents 2/3 of the difference in net pay between the salaries of an electrician and an Engineering Aide I at the time of his original injury, not at the time of his reassignment as an Engineering Aide I. No adjustments have been made to account for electrician wage increases. If reinstated to the position of electrician, Mr. Malmberg would be entitled to back pay (the difference between gross wages as an Engineering Aide I plus workers' compensation, and gross wages which he would have received as an electrician if not reassigned), pension restoration (the difference between employer and employee contributions as an Engineering Aide I and employer and employee contributions had he remained in the position of electrician) and credit as an electrician for all hours worked since February 13, 1995 for seniority and pension purposes

Pursuant to a "one-time" agreement between the City and Jerry Westerholm, a Business Representative for Local 292, Mr. Malmberg received the full rate of pay as an electrician during the 30-day period starting on June 12, 1995.

Based upon the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Any of the foregoing Findings of Fact more properly considered Conclusions of Law are hereby adopted as such.

2. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.46.

3. The Department of Veterans Affairs gave proper notice of the hearing and has fulfilled all relevant substantive and procedural requirements of law and rule.

4. When the City of Minneapolis "detailed" Charles Malmberg to work as an Engineering Aide I rather than as an electrician, effective February 15, 1995 that demotion action constituted a "removal" within the meaning of Minn. Stat. § 197.46.

5. The City of Minneapolis failed to provide Charles Malmberg, Jr. with adequate " . . . stated charges, in writing." within the meaning of Minn. Stat. § 197.46 when it informed him, by way of written notice dated February 16, 1995, that he was being "detailed" from employment as an electrician to employment as an Engineering Aide I, which employment resulted in a loss of pay and benefits.

6. The relief available to the Veteran under the circumstances noted in the preceding Conclusion is provision of a written notice of a right to a hearing specifying job-related reasons for the removal, noting particularly the medical and health concerns

of the Employer, and notifying him that he has 60 days to request a Veterans Preference hearing before the Minneapolis Civil Service Commission on the merits of the removal decision. The Veteran is entitled also to restoration of pay and benefits equal to those he would have received as an electrician for the period from February 16, 1995 until a final decision has been reached by the Minneapolis Civil Service Commission.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of Veterans Affairs Order that Charles Malmberg, Jr. be provided with written notice from the City of Minneapolis specifying detailed, job-related reasons for removal from his position as an electrician to that of an Engineering Aide 1, and notifying him that he has 60 days to request a hearing before the City's Civil Service Commission on the merits of the removal.

IT IS RECOMMENDED FURTHER that the Commissioner issue an Order that grants Mr. Malmberg a restoration of pay and benefits to the level of an electrician, from February 13, 1995 through the date of a final decision by the Minneapolis Civil Service Commission on the merits of the removal decision.

Dated this 26th day of February, 1996

/s/

RICHARD C. LUIS

Administrative Law Judge

Reported: Taped

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The City argues that Mr. Malmberg was not "removed" from his employment as an Electrician within the meaning of the Veterans Preference Act (VPA) and that, even if the requirements of Minn. Stat. § 197.46 apply, that the Employee received ". . .due

notice, upon stated charges, in writing." within the meaning of that statute. The Administrative Law Judge cannot agree.

The Veteran, although still "classified permanently" as an Electrician, has served in the position of an Engineering Aide I since mid-February, 1995. He has not been paid as an Electrician, has performed no duties as one and has not accrued seniority or pension benefits as an Electrician since that time. Reassignment to a different position at lesser pay and benefits is a demotion, and demotions constitute "removal" within the meaning of the Veterans Preference Act. Leininger v. City of Bloomington, 299 N.W.2d 723, 726 (Minn. 1980).

The City's reliance on Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987) is misplaced. The Employer distinguishes the situation here from that in Myers by emphasizing that the City is doing what it can to keep Malmberg employed until he is physically fit to return to his permanent position as an electrician, whereas the City of Oakdale considered Myers unfit to do his job on a permanent basis, due to a permanent partial disability, and placed him on indefinite leave from all employment. That argument or distinction ignores the underlying principle that the rights of a veteran removed by an involuntary, indefinite medical demotion are the same as those of a veteran removed by involuntary, indefinite medical leave. Mr. Malmberg's "180-day" assignment to work as an Engineering Aide I expired approximately six weeks before the hearing, which fact implies it was renewed and will remain in effect indefinitely. It appears to the ALJ that a demotion has been in effect since February 13, 1995, which will continue until the City's Civil Service Commission (or other designated veterans preference board) restores Malmberg to his position as an Electrician or until the Public Works Department gives him back his old job. During that interim, Malmberg has been "removed" within the meaning of the Veterans Preference Act.

Whether or not the Veteran received "stated charges, in writing" sufficient to satisfy the Act is resolved by an examination of Joint Exhibit 2, the February 16, 1995 letter and "Detail Request and Authorization" form mailed to Mr. Malmberg on that date.

The notice to Malmberg does not explain in sufficient detail that the City demoted him because of its concern that he could not perform physically the tasks assigned to electricians in the Department of Public Works. Without such an explanation, the Veteran has no fair opportunity to respond.

The notice does not indicate why, beyond the allegation that an Engineering Aide I position meets "the limitations placed on (him) by his doctor and/or QRC", such limitations make Mr. Malmberg unfit to perform as an Electrician. Even if the notice makes such an implication, it does not state the limitations, so it is insufficient as a matter of law. In this case, the Veteran is left with conjecture and supposition as to the specific charges supporting the City's refusal to return him to his position as an Electrician, and that is not enough to satisfy the statute. The Judge agrees with the argument of counsel for Mr. Malmberg -- charges that must be inferred are not "stated charges, in writing" within the meaning of the VPA.

The City maintains that sufficient notice was issued on February 16, 1995 "given the QRC/medical background involvement of Malmberg". In other words, Malmberg knew what the restrictions were (basically, they involve restrictions against lifting objects

greater than a certain weight) and knew also that the City was holding him out of reassignment as an Electrician because of those restrictions. This argument ignores the fact that the "stated charges, in writing" must specify the problem, and the notice issued on February 16, 1995 falls short of that.

Counsel for the City argues that the requirement of stating "charges" more befits an action based on misconduct, and that the requirement for an employer to explain the bases of its action in this case, involving "incompetency" (inability to perform job duties) under the statute, is "vitiating" because the Employee was involved in the process of analyzing his physical capabilities and assessing whether they kept him from returning to full duty as an Electrician from the beginning. The ALJ does not agree. In fact, the documents attached to the City's Initial Brief, designed in part to show continued involvement and actual knowledge on the part of Malmberg, show that as of February 24, 1995, the only specific reason for not assigning Electrician duties was Mr. Malmberg's inability then to lift 60 pounds (Attachment 5). However, by March 25, 1995, Malmberg was able to lift 60 pounds (Attachment 6), and by April 20, 1995, he had reached "Maximum Medical Improvement" (Attachment 7), yet he still was not and has not been reassigned. It is noted that Attachments 5, 6 and 7 are all communications from a Qualified Rehabilitation Counselor (QRC) to the City, and no copy was provided to Mr. Malmberg. Nor was anything presented to him in writing regarding the City's concerns about his physical inability to work prior to the demotion action. Given that, the Employer's reasons for not returning the Veteran to work as an Electrician remain ambiguous. This indefiniteness can be cured only by issuing a notice detailing the Employer's reasons for not returning Malmberg to his old job. After that, Mr. Malmberg can proceed with his hearing before the Civil Service Commission on the merits of the case.

As to appropriate remedies, Mr. Malmberg has yet to receive "stated charges, in writing" under Minn. Stat. § 197.46. Accordingly, the Commissioner of Veterans Affairs can order that a notice specifying the City's specific charges be issued, that Mr. Malmberg be given 60 days after the issuance of specific charges to request a hearing on the merits before the appropriate board and can order further that Mr. Malmberg be restored back pay and benefits to bring him to the same level of compensation and benefits that he would have been had he been employed as an Electrician since February 13, 1995, such pay and benefits to continue until such time as the Minneapolis Civil Service Commission, after a hearing, orders otherwise. Minn. Stat. § 197.481.

The notice requirements of the Veterans Preference Act and other remedial statutes are to be construed strictly. Young v. City of Duluth, 386 N.W.2d 732, 738 (Minn. 1986); Anderson v. Moberg Rodlund Sheet Metal Co., 316 N.W.2d 286, 288 (Minn. 1982). Since the February 16, 1995 notice was inadequate under Minn. Stat. § 197.46, Mr. Malmberg should have 60 days, after the issuance of proper notice, to appeal to the Civil Service Commission. Minn. Stat. § 197.46; Matter of Schrader, 394 N.W.2d 796, 801 (Minn. 1986). This result is appropriate because the veterans preference statute mandates a hearing before an employee can be removed, and Mr. Malmberg cannot be viewed as having waived his right to such a hearing when he has never been served with proper notice that he has the right to request one. Young, at 738. Such a notice has not been issued in this case because the Veteran has never

been apprised of sufficient reasons, in writing, for the reassignment on February 13, 1995.

RCL